

CONCUSSION TRAINING LACKING IN FEDERAL CIVIL RIGHTS CLAIM

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Within the context of public parks, recreation, and sports, personal injury liability for negligence should be the exception, rather than the rule. For the most part, absolute sovereign immunity under the traditional common law has been abolished for federal, state and local governmental entities. That being said, most jurisdictions have either retained significant aspects of traditional governmental sovereign immunity or provided limited statutory immunity for governmental providers of public sports and recreation programs.

In general, many of these limited immunity statutes under state law preclude governmental liability for ordinary negligence. Accordingly, any governmental liability usually requires proof of gross negligence. Unlike mere carelessness which characterizes ordinary negligence, gross negligence typically involves much more reckless and outrageous misconduct which demonstrates an utter disregard for the physical well being of participants. When applicable, limited statutory immunity available under state law significantly increases the likelihood that a lawsuit will be summarily dismissed prior to trial.

In recent years, most jurisdictions have enacted some variation of “Concussion Legislation” which generally requires sport coaches, particularly those in a public school setting, to be trained to recognize signs or symptoms of a concussion or traumatic brain injury sustained during an athletic activity. Once a coach observes a participant exhibiting signs or symptoms of a concussion, the coach is obligated to follow remove the participant from an athletic activity and follow regulatory protocols.

For example, in Pennsylvania, the “Safety in Youth Sports Act,” 24 P.S. § 5323 (2014) requires the state department of health and the state department of education to develop web based guidelines and other relevant materials “to inform and educate students participating in or desiring to participate in an athletic activity, their parents and their coaches about the nature and risk of concussion and traumatic brain injury, including the risks associated with continuing to play or practice after a concussion or traumatic brain injury.” Moreover the Act requires the governing body of a school to suspend, either temporarily or permanently, any sports coach who violates the requirements of the Act.

This state legislation, however, expressly states that nothing in the Act “shall be construed to create, establish, expand, reduce, contract or eliminate any civil liability on the part of any school entity or school employee.” Accordingly, this Act would not waive any applicable governmental immunity, including sovereign immunity under the Pennsylvania state tort claims act. Similarly, it appears that most of these recently enacted “concussion laws” in other jurisdictions do not establish an independent legal basis for any additional civil liability under state law.

In Pennsylvania, the state tort claims act had effectively reinstated traditional sovereign immunity for public entities with limited exceptions. The statutory list of enumerated exceptions does not include a waiver of sovereign immunity for negligent public sport coaches and athletic

activities. As a result, under Pennsylvania state law, a negligent, even grossly negligent, governmental entity and its sports coach employees would most likely be immune from any liability.

With no basis for governmental sports coach liability under the Pennsylvania state tort claims act, as illustrated by the case described herein, an injured plaintiff might still seek legal redress under federal civil rights law in a federal district court. Specifically, Section 1983 of the federal civil rights law could possibly provide an alternative but more demanding legal basis for governmental liability for a “state created danger.” Within the context of Section 1983, a state created danger would require evidence of “a degree of culpability which shocks the conscience.” Accordingly, the requisite degree of governmental indifference necessary to trigger Section 1983 liability under federal civil rights law is somewhat analogous to the utter disregard and gross negligence required to establish governmental liability in many jurisdictions with limited immunity statutes under state law.

As noted, many of these recently enacted “concussion laws” tend to be school based and do not establish any independent legal basis for a claim by an injured athlete. That being said, the training and protocols specified in these laws could provide evidence to support a claim for sports coach negligence liability in general. Specifically, in those jurisdictions which allow such negligence claims, a school based law could be offered as persuasive evidence of the applicable legal standard of care, representing the “life of the community,” the customs, practices and usages of a reasonable sports coach in other settings, including public parks and recreation.

In Pennsylvania, however, governmental immunity under the state tort claims act is much broader and would presumably insulate the defendants from any negligence liability in the case described below. If so, this perhaps may explain why the plaintiff in this particular case chose to pursue a federal civil rights claim in federal district court.

TWO COLLISIONS

In the case of *Mann v. Palmerton Area School District*, 2014 U.S. Dist. Lexis 97142 (M.D. Pa. 7/17/2014), plaintiff Sheldon Mann was injured while participating in Palmerton’s football program. Mann was participating in football practice at Palmerton Area High School when he was hit by a teammate running full speed towards him. The coaching staff came onto the field to attend to Mann's injury. After this first hit, Mann reported to the coaches feelings of numbness and/or disorientation. In addition, Mann's behavior was erratic. However, immediately after the incident, the coaches told Mann to continue to play in the practice. In so doing, the coaches failed to perform a medical evaluation or concussion testing or to send him to the athletic trainer.

Later on during the same football practice, Mann was hit for a second time by a teammate running at full speed. After the second hit, Mann was confused, dazed, and unable to continue practice. He experienced physical manifestations of his injury, including dry heaving. Football practice concluded shortly thereafter. Based on the observations of others, Mann's behavior was erratic, and he was taken to the school's trainer. After practice, Mann could not provide complete information to the trainer regarding the two hits he sustained. The trainer was not informed that Mann had been involved in two collisions. The coaches also failed to notify

Mann's parents of his injury. Following this incident, Mann was left incapacitated after suffering a serious and permanent traumatic brain injury.

In the subsequent lawsuit, Mann alleged that Palmerton “did not have a proper policy and/or procedure in place to instruct student athletes on the causes, hazards, symptoms, and dangers of traumatic brain injuries.” Mann also alleged that Palmerton did not ensure that he was “medically cleared to return to practice” despite Mann’s “physical manifestations and his complaints after his first hit.” Further, Mann claimed Palmerton “failed to enforce and/or enact proper and adequate policies for head injuries resulting from athletic activities.” Moreover, Mann claimed these alleged “failures” on the part of Palmerton “were a normal practice, custom, or policy.”

STATE CREATED DANGER

In his complaint, Mann asserted a Fourteenth Amendment due process claim "for injury as a result of a state created danger." In response, Palmerton claimed Mann had failed to state a claim under the state created danger theory. Moreover, Palmerton claimed Mann had failed to state any legal cause of action under the Fourteenth Amendment regarding municipal liability.

According to the federal district court, 42 U.S.C. § 1983 (“Section 1983”) provides “a method for vindicating federal rights secured by the United States Constitution or federal statutes.” As cited by the court, in pertinent part, Section 1983 of federal civil rights law provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage subjects, or causes to be subjected, any citizen or other person to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.” 42 U.S.C. § 1983. In part, the Fourteenth Amendment guarantees individuals cannot be deprived of their right of “bodily integrity” by the government.

As noted by the court, “[t]o establish liability under 42 U.S.C. § 1983, a plaintiff must show that the defendants, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury.” In particular, the court found a plaintiff must establish the following four elements to “prevail on a state created danger claim” under Section 1983:

- (1) the harm ultimately caused was foreseeable and fairly direct;
- (2) a state actor acted with a degree of culpability that shocks the conscience;
- (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
- (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

As to the first prong, Palmerton claimed Mann had failed to allege that the harm ultimately caused was foreseeable and fairly direct. According to the court, within the context of Section

1983, such fairly direct foreseeability requires the government to have “knowledge or an awareness that is sufficiently concrete to put the [government] actors on notice of the harm.”

As noted by the court, Mann had alleged that Palmerton knew, or should have known, that traumatic brain injuries, including but not limited to concussions” were “a common hazard associated with football activities.” Moreover, Mann had alleged that Palmerton “knew or should have known that allowing student athletes to continue to participate in athletic activities after experiencing concussion and/or traumatic brain injury symptoms posed a significant risk of serious bodily injury.” Mann therefore claimed the injuries he suffered in his second concussion were a “fairly direct” result of the coaches telling him to continue to play in the practice “immediately following” the first hit.

In the opinion of the federal district court, Mann had alleged sufficient facts to “satisfy the first prong of the state created danger test.” Similarly, the federal district court found Mann had alleged sufficient facts to satisfy the second prong of the state created danger test, i.e., Palmerton had “acted with a degree of culpability that shocks the conscience.” In so doing, the court noted “the possibility that deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known.” According to the court, such indifference was evident when the coaches instructed Mann to continue to practice after observing him “getting hit on the field and subsequently exhibiting symptoms of a head injury.” Moreover, the court found Palmerton was or should have been “aware of the risk of continuing to play football with a head injury.”

Because the coaches ordered Mann to re-enter the practice after sustaining a concussion, the court also found Mann was a foreseeable victim of Palmerton’s actions (i.e., the third prong of the state created danger test). Further, the federal district court found Mann had alleged sufficient facts to satisfy the fourth prong of the state created danger test, i.e., Palmerton had used its authority in to way that rendered Mann more vulnerable to a created danger.

In his complaint, Mann had alleged that “decisions made by the coaching staff increased the severity” of his “signs and symptoms, and/or exposed him to future injuries including but not limited to second impact syndrome and/or other cognitive injury.” Despite having personally observed his “disoriented disposition,” Mann claimed the coaches “acted in deliberate indifference to his health, safety and welfare by placing him back into practice.”

In the opinion of the federal district court, Mann had sufficiently alleged facts to “satisfy each element of the state created danger theory.” As a result, the court denied Palmerton’s motion to dismiss Mann’s “state created danger” civil rights claim.

FAILURE TO TRAIN LIABILITY

As noted by the federal district court, to hold Palmerton liable under the state-created danger theory, Mann would also need to show that Palmerton “maintained an official policy or custom that resulted in the deprivation” of Mann’s constitutional rights. In so doing, the court acknowledged that “[m]unicipal employers such as school districts, cannot be held vicariously liable for the constitutional violations committed by their employees.” Vicarious liability would

hold employers liable for the employment related negligent acts of their employees. Under Section 1983, however, the court found "municipal liability would only attach when a plaintiff demonstrates that an official policy or custom caused the asserted constitutional deprivation." According to the court, "a policy may be established by a municipality's failure to train its employees." Although "not authorized by law," the court found further that a permanent and well settled course of conduct or practice could be considered a "custom."

Moreover, once a municipal policy or custom is identified, the court found a plaintiff must still demonstrate that the municipality's deliberate conduct was "the moving force behind the injury alleged" and "the municipal action was taken with deliberate indifference as to its known or obvious consequences." That being said, the court cautioned that simple allegations of ordinary or gross negligence would not be sufficient to support a Section 1983 claim under federal law. Instead, the court noted that Section 1983 requires a plaintiff to demonstrate "deliberate indifference" based upon "a pattern of violations" involving a "failure to adequately screen or train municipal employees." Absent a pattern of violations, the court acknowledged that a plaintiff could still establish the requisite "deliberate indifference" by satisfying the following "high burden" of proof:

[Plaintiff must] demonstrate that the violation of federal rights was a highly predictable consequence of the municipality's failure to train its employees regarding how to handle recurring situations. The fact that a situation is likely to recur and the predictability that a municipal employee will violate federal rights without adequate training can reflect deliberate indifference.

Applying these principles to the facts of the case, the federal district court concluded Mann had sufficiently alleged that Palmerton "had a policy or custom of failing to medically clear student athletes and failing to enforce and/or enact proper and adequate policies for head injuries." Specifically, the court found Palmerton's "failure to recognize and educate their student athletes concerning the causes, symptoms and dangers of traumatic head injuries sufficiently alleged a common custom or practice of ignoring the consequences of head injuries." In the opinion of the court, this holding was "bolstered by allegations that the plaintiff's injuries occurred in open view of coaches and trainers." Moreover, the court found Palmerton's "failure to train the coaches on proper procedures and a safety protocol amounts to deliberate indifference to recurring head injuries, a common hazard associated with football."

CONCLUSION

Accordingly, the federal district court denied Palmerton's motion to dismiss Mann's municipal liability claim. Having alleged sufficient facts to avoid having his Section 1983 claim dismissed prior to trial, the federal district court would conduct further proceedings to fully consider the issues of state created danger and municipal liability. In addition to compensatory damages, reasonable attorney fees would also be available to a prevailing party in a Section 1983 claim.

Although Mann had alleged sufficient facts to remain and proceed in federal court, he would still have a heavy burden of proof to ultimately establish Section 1983 civil rights liability under the circumstances of this case. Federal appeals courts have not been very receptive to attempts to

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effectively fashion a federal Section 1983 civil rights claim around a claim of damages for personal injuries more suited to consideration by state courts under state law principles governing negligence liability. Should Mann ultimately prevail in the federal district court, a federal appeals court could subsequently overturn any judgment that imposed Section 1983 federal civil rights liability under the circumstances of this case. Regardless, this case illustrates some general legal principles governing civil rights liability under federal law as an alternative to negligence liability under state law.

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